

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

NAGI A. OMER,

Defendant-Appellee.

UNPUBLISHED

August 4, 2000

No. 220282

Wayne Circuit Court

LC No. 97-009835

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NAGI A. OMER,

Defendant-Appellant.

No. 223320

Wayne Circuit Court

LC No. 97-009835

Before: Hood, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

Defendant was found guilty of delivery of fifty grams or more, but less than 225 grams, of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii). The trial court found substantial and compelling reasons to depart from the mandatory ten-year minimum sentence and sentenced defendant to three to twenty years' imprisonment. In Docket No. 220282, the prosecutor appeals defendant's sentence as of right. In Docket No. 223320, defendant appeals his conviction as of right. We affirm defendant's conviction, but remand for resentencing.

In Docket No. 220282, the prosecutor contends that the trial court abused its discretion in sentencing defendant below the mandatory minimum sentence required by statute. See MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii). Generally, a defendant's sentence must "be proportionate to the seriousness of the circumstances surrounding the offense and the offender."

People v Milbourn, 435 Mich 630, 636; 461 NW2d 1 (1990). A statutory minimum sentence imposed by the Legislature is presumed to be proportionate and valid. See *People v Williams*, 189 Mich App 400, 404; 473 NW2d 727 (1991). Notwithstanding the minimum ten-year sentence required by the statute, a trial court may depart below a mandatory minimum sentence if there are substantial and compelling reasons to do so. MCL 333.7401(4); MSA 14.15(7401)(4).

The Supreme Court recently held that “only objective factors that are capable of verification may be used to assess whether there are substantial and compelling reasons to deviate from the minimum term of years imposed by the Legislature.” *People v Daniel*, 462 Mich 1, 6; 609 NW2d 557 (2000). Examples of objective and verifiable factors that may be considered in deviating from a minimum sentence include the defendant’s prior record, age, work history, cooperation with law enforcement, and other factors arising before or after the defendant’s arrest. *People v Fields*, 448 Mich 58, 77; 528 NW2d 176 (1995). Emphasis should also be placed on any mitigating circumstances surrounding the offense. *Id.* at 76. However, subjective factors such as a defendant’s expression of remorse cannot be considered in a downward departure because they are not objective and verifiable. *Daniel*, *supra* at 6-7.

This Court reviews a trial court’s factual findings regarding the existence of an objective and verifiable factor to warrant a downward departure from a mandatory minimum sentence under a clearly erroneous standard. *Fields*, *supra* at 77. Whether a factor is objective and verifiable is determined as a matter of law by this Court. *Id.* at 77-78. Finally, this Court reviews a trial court’s decision that a factor constitutes a substantial and compelling reason to deviate from a mandatory minimum sentence for an abuse of discretion. *Id.* at 78.

In this case, we find no clear error in the trial court’s findings of fact regarding defendant’s clean record, his employment history, his relatives in the community, and his imminent deportation. However, as a matter of law, the trial court erred in finding defendant’s possible deportation an objective and verifiable factor for consideration in its downward departure. See *People v Arcos*, 206 Mich App 374, 376-377; 522 NW2d 655 (1994). Thus, the trial court’s decision to depart from the minimum sentence was based in part on an inappropriate factor.

Further, the trial court failed to properly articulate its reasons for deviating from the mandatory minimum sentence. See *Daniel*, *supra* at 8-9. Even if a trial court finds that appropriate factors exist, “the simple iteration of objective and verifiable factors alone is insufficient to meet the statutory standard: the sentencing court must also specifically articulate the reasons why the factors it identifies and relies upon collectively provide “substantial and compelling” reasons to except the case from the legislatively mandated regime.” *Id.*, quoting *People v Johnson (On Remand)*, 223 Mich App 170, 173-174; 566 NW2d 28 (1997). The trial court did not comply with this rule because it merely listed the factors, one of which was not objective and verifiable, and did not indicate why these factors were substantial in this case or made a compelling rationale for deviating from the mandatory minimum sentence. *Johnson*, *supra* at 175.

Because the trial court considered both appropriate and inappropriate factors in determining defendant’s sentence, and because it failed to articulate reasons why the appropriate factors constituted

substantial and compelling reasons for departure, we remand this case to the trial court for resentencing. On remand, the trial court should determine if substantial and compelling reasons exist to deviate from the mandatory minimum sentence when only objective and verifiable factors are considered. *Daniel*, *supra* at 8. In addition, we urge the trial court to rethink whether the factors in this case really justified a downward departure in light of *People v McNeil*, 450 Mich 1013; 544 NW2d 477 (1996) and *People v Perry*, 216 Mich App 277, 283; 549 NW2d 42 (1996). We further advise the court, if it finds that there are substantial and compelling reasons, it should consider the extent of the deviation from the mandatory minimum sentence so as not to impose a disproportionately lenient sentence. *Perry*, *supra* at 284.

In Docket No. 223320, defendant argues that the evidence was insufficient to support his conviction because the prosecution presented no evidence that he knew there was cocaine in the package he delivered. The standard of review for a sufficiency of the evidence claim is whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt when the evidence is viewed in the light most favorable to the prosecution. *People v Mass*, 238 Mich App 333, 335; 605 NW2d 322 (1999).

The elements of unlawful delivery of cocaine are as follows: (1) the defendant delivered a controlled substance, (2) the substance delivered was cocaine and the defendant knew it was cocaine, (3) the substance was in a mixture that weighed more than fifty grams but less than 225 grams, and (4) the defendant was not legally authorized to deliver the substance. MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii); see also *People v Crawford*, 458 Mich 376, 389; 582 NW2d 785 (1998). The only element defendant contends was not proved by sufficient evidence was that defendant knew he was delivering cocaine.

To establish the elements of a crime at trial, circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof. *People v Greenwood*, 209 Mich App 470, 472; 531 NW2d 771 (1995). Moreover, an actor's intent may be inferred from all of the facts and circumstances of the evidence presented and, because a defendant's state of mind is difficult to prove, minimal circumstantial evidence is sufficient. *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998). However, although inferences may be made by the jury based on facts established at trial, a jury may not find a defendant guilty based on one inference built upon another. *People v Wilson*, 107 Mich App 470, 474; 309 NW2d 584 (1981). Finally, questions of credibility are left to the trier of fact to resolve. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

Viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence for the jury to find that defendant knew the bag he was delivering contained cocaine. First, the amount of cocaine involved in this transaction may have raised the inference that defendant was an active and informed participant in the delivery of cocaine. Further, the jury could have inferred that defendant knew the bag contained cocaine based on the circumstances surrounding the transaction. Not only did defendant participate in delivering the bag of cocaine to Ahmed Alshubili, Alshubili then told defendant they had to deliver it to some other men. There was testimony that may have established that telephone contact was made between Alshubili and the informant sometime during the period when defendant was

with Alshubili in the car. When the transaction occurred, the informant testified that he went to Alshubili's car window and asked for the "stuff." Alshubili then asked if the informant had the money for it and the informant said that his friend had to inspect it first. In response, defendant handed Alshubili the bag to give to the informant. The jury could have inferred from defendant's actions and the surrounding circumstances that he knew the bag contained cocaine and was a knowing participant in a drug transaction. Therefore, viewed in a light most favorable to the prosecution, the evidence was sufficient to support defendant's conviction.

Defendant's conviction is affirmed, but we remand for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Harold Hood

/s/ David H. Sawyer

/s/ Mark J. Cavanagh